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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 379

EARL WEBB, AS PRESIDENT OF SIGMA TAU GAMMA, AN UNINCORPORATED ASSOCIATION, ETC., ET AL.,

Appellants,

v.

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, PRESIDENT, CHARLES GARSIDE, ET AL., ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statute sustaining jurisdiction	2
Statute, the validity of which is involved	2
Dates of judgment and application for appeal	3
Nature of the case and rulings below	3
Grounds for contention that questions involved are substantial	4
Appendix "A"—Opinion of Judge Foley of April 27, 1954	9
Appendix "B"—Opinion of three-judge Court	17

Table of Cases Cited

Alabama v. *United States*, 279 U. S. 229	6
Federal Tel. & Radio Corp., In re, 301 N. Y. 95	5
Grannis v. *Ordean*, 234 U. S. 385	5
Hamilton v. *Regents*, 293 U. S. 245	5
Harkness v. *Irion*, 278 U. S. 92	4
Hughes v. *Caddo Parish School Bd.*, 57 Fed. Supp. 508, 323 U. S. 685	5
Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245	4
Joyner v. *Browning*, 30 Fed. Supp. 512	5
Lee v. *Roseberry*, 200 F. (2d) 155	4
Matter of Weekes v. *O'Connell*, 304 N. Y. 259	5
Milliken v. *Meyer*, 311 U. S. 457	5
Prust v. *Board of Trustees*, 232 U. S. 604	5
Radio Corporation of America v. *United States*, 341 U. S. 412	4
Risley v. *City of Utica*, 168 F. 168	5
Waugh v. *Mississippi University*, 237 U. S. 589	5

Statutes Cited

Constitution of the United States:

	Page
Article I	4
14th Amendment	4
Education Law of the State of New York, Section 355 (Chapter 734, Laws of New York of 1951; Laws of 1953, Chapter 525)	2

United States Code, Title 28:

Section 1253	2, 3
Section 2101	2
Section 2281	2
Section 2284	2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors,

Appellants,

against

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President; CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. GREENMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MORRE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, Comprising the Trustees of STATE UNIVERSITY OF NEW YORK,

Appellees

Civil Action No. 5063

Appeal from the United States District Court for the Northern District of New York.

Statement of Basis on which Appellants Contend the Supreme Court of the United States has Jurisdiction to Review on Appeal the Judgment of dismissal and order Appealed from, as Required by Supreme Court Rule 12.

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Pursuant to Supreme Court Rule 12, par. 1, Earl Webb, as President of Sigma Tau Gamma, an unincorporated Association, and all others similarly situated etc., the above appellants, files this, his and its statement particularly disclosing the basis on which appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I

Statute Sustaining Jurisdiction

The statutory provision believed to sustain appellate jurisdiction is Section 1253 of Title 28 of the United States Code, which provides that:

> § 1253. Direct appeals from the decision of three-judge courts.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

Also Sections 2101, 2281, and 2284 of Title 28 U. S. C.

II

Statute, the Validity of which is involved.

The statute of the State of New York, the validity of which is involved, is Section 355 of the Education Law of the State of New York, being embodied in Chapter 734, Laws of New York of 1951, as follows:

> "§ 355. Power and duties of Trustees—Administrative functions.
>
> "2. The state university trustees are further authorized and empowered, subject to the general supervision and approval of the Board of Regents:

"b. To make and establish and from time to time alter and amend such rules and regulations not inconsistent with law, for the government of the state university and the institutions therein.

"This act shall take effect immediately."

The same provision was incorporated in § 355 as amended by Chapter 525, Laws of 1953, of the State of New York, and the amendment provided:

"8. This act shall take effect September first, nineteen hundred fifty-three."

III

1. The judgment appealed from was entered in the office of the Clerk of the District Court for the Northern District of New York on the 7th day of June, 1954.

2. The application for an appeal herein was presented on the 25 day of June, 1954.

IV

Nature of Case and Rulings of Court to Bring Case Within Jurisdictional Provisions Relied on.

1. The appeal herein is from a judgment of dismissal of a three-judge District Court in which an interlocutory or permanent injunction was prayed for in Civil Case Docket Number 5063 to restrain the enforcement of a resolution passed by the Trustees of State University of New York on the 8th day of October, 1953, banning all national affiliation of social fraternities at state colleges and for a declaratory judgment.

2. The rulings of the Court were such as to bring the case within the jurisdictional provisions relied on, in that Section 1253, Article 28, United States Code, provides that

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an appeal may be taken from any such court in such a case direct to the Supreme Court of the United States.

3. The cases believed to sustain the jurisdiction are as follows:

a. *Harkness* v. *Irion*, 278 U. S. 92;
b. *Interestate Busses Corporation* v. *Blodgett*, 276 U. S. 245;
c. *Radio Corporation of America* v. *United States*, 341 U. S. 412;
d. *Lee* v. *Roseberry*, 200 F. (2d) 155.

V

Grounds for Contention that Questions Involved are Substantial.

The grounds upon which it is contended the questions involved are substantial are that the entire college fraternity system in America is believed to be at stake; the action on the part of the Trustees of State University, and the method employed, is unreasonable, arbitrary and capricious; it interferes with the constitutional guarantee of free assembly, is violative of the provisions of Article 1 of the Bill of Rights, and would seem to deprive fraternities of any right of being heard, and deprives them of property without due process of law, in violation of guarantees provided in the 14th Amendment.

Plaintiffs further contend the three-judge court erred in that part of their decision wherein they stated "lack of notice and hearing before adoption of a resolution by an administrative body is not a denial of due process where legislative action of a prospective nature is taken under a valid delegation of powers from the legislature. See *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 694, (9th Cir.), cert. den. 338 U. S. 860." That part of the opinion referred to is simply dicta. It refers only to some inconsiderate portion of an order of a Board. In the instant case thou-

sands of dollars worth of property is affected. Such a construction as adopted by the three-judge court is fairly arguable, as contained in the opinions of the New York Court of Appeals in *Matter of Weekes* v. *O'Connell*, 304 N. Y. 259.

See In re *Federal Tel. & Radio Corp.*, 301 N. Y. 95. A fundamental principle of due process is the opportunity to be heard, *Grannis* v. *Ordean*, 234 U. S. 385; *Milliken* v. *Meyer*, 311 U. S. 457; *Prust* v. *Board of Trustees*, 232 U. S. 604. The opinion of the three-judge court does not question jurisdiction; it must therefore be assumed to exist. It was the duty of the court to pass on this question. *Joyner et al.* v. *Browning et al*, 30 Fed. Supp. 512.

Where plaintiff sues in a class action, the aggregate claims of plaintiff and all interveners must be considered in passing on jurisdiction. *Risley* v. *City of Utica*, 168 F. 168.

The opinion of the three-judge court cited *Waugh* v. *Mississippi University*, 237 U. S. 589; *Hughes* v. *Caddo Parish School Bd.*, 57 Fed. Supp. 508, aff'd 323 U. S. 685, and *Hamilton* v. *Regents*, 293 U. S. 245.

In the Waugh case the legislature had by act banned fraternities, but there a distinction was made as to the students then in college and those who had graduated, the ins and outs. In the instant case this was not done, as shown by plaintiff's exhibit, demanding that no students be pledged or initiated after January '54.

In the Hughes case there was an enabling act of the legislature and an opportunity to be heard.

In the Hamliton case the college was granted land on condition that military training be followed by students. Plaintiffs were conscientious objectors. The Board of Regents in conformity to the grant required the students to take a course in military training. The court properly re-

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quired this to be done. This decision confirms plaintiff's contention.

The Appellant appends hereto a copy of the opinions delivered in this cause by the three-judge District Court, as well as of the District Court in referring the matter to a three-judge court.

VI

As this is an appeal from denial of an interlocutory decree of a specially constituted District Court of the United States, it is claimed the Court abused its discretion in denying said interlocutory injunction for the following reasons:

The holding that the provisions of the "Education Law" granted to the Trustees the power to abolish fraternities was directly contrary to the great weight of established law. The legislature only could accomplish this. No implied approval could be assumed from the Board of Regents.

The undersigned is cognizant of the opinion of the Supreme Court of the United States in *Alabama* v. *United* States, 279 U. S. 229, to effect that this court will not reverse a decision of the lower court based on the exercise of discretion, unless such discretion was improvidently exercised.

Mr. Judge James T. Foley, in his opinion of April 27, 1954, now a member of the three-judge court, stated as follows:

> "Most significant, however, is the fact that the principle enunciated in the Waugh case and relied upon by the defendants as having such tremendous impact as to foreclose the subject was not cited as authority or precedent in the latter Hamilton case. In the Hamilton case, at page 258, the Supreme Court rejected flatly the argument that a substantial federal question was lacking, and stated, 'we are unable to say that every question that appellants have brought for decision is so clearly not debatable and utterly lacking in merit as

to require dismissal for want of substance.' The significant factor in Hughes v. Caddo, supra, is that the matter was decided by a three-judge court and dismissed for want of jurisdiction, and such procedure was not questioned by the Supreme Court in the affirmance. In the recent case, Pyeatte v. Board of Regents of the Univ. of Oklahoma, 102 F. S. 407, aff'd. 342 U. S. 936, a similar challenge in a like situation to a ruling of the Board of Regents was heard by a three-judge court and the matter was considered and denied upon the merits. The court considered and discussed the Hamilton case but did not dismiss peremptorily for want of jurisdiction. Frankly, under this state of the law, I do not find clear uniformity and consistency which to my mind forecloses automatically the position assumed here by the plaintiffs in their pleadings (Rok v. Legg, 27 F. S. 243; Acret v. Harwood, 41 F. S. 492). Because of my own difficulty in research it would be most hypocritical to state categorically and I am unable to say that the questions are foreclosed and not fairly open to debate, and thus deprive the plaintiffs upon uncertain grounds of the prescribed hearing."

It is therefore respectfully submitted that this Court has jurisdiction of this appeal.

Dated: June 21, 1954.

DANIEL F. MATHEWS,
Syracuse, N. Y.,
A Member of the United States Supreme Court.
Admitted Dec. 11, 1934.

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Appendix "A"

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

EARL WEBB, AS PRESIDENT OF SIGMA TAU GAMMA, AN UNINCORPORATED Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Interveners,

Plaintiffs,

vs.

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President, CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. GREENMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MOORE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, comprising the Trustees of STATE UNIVERSITY OF NEW YORK,

Defendants

Civil Action No. 5063

Appearances: Clifford H. Searl, Esquire, Attorney for Earl Webb, as President etc.; Alumni Association of Alpha Kappa Kappa, Inc., Hotel Syracuse, Syracuse, New York.

Hancock, Dorr, Ryan & Shove, Esquires, Attorneys for intervening Plaintiff, Delta Kappa, Inc., 800 Hills Building, Syracuse, New York.

Kernan & Kernan, Esquires, Attorneys for Intervening Plaintiff, Phi Sigma Epsilon, First National Bank Building, Utica, New York.

Butterfield, Gibbs, Harrington & Bernhardt, Esquires, (Robert P. Harrington, Esquire, and Julien B. Erway, Esquire, of Counsel), Attorneys for Intervening Plaintiffs Pi Kappa Sigma; Delta Sigma Epsilon Sorority; Alpha Sigma Tau Sorority, Theta Sigma Upsilon Sorority; Roger Mueller, 1036 Ellicott Square, Buffalo 3, New York.

Nathaniel L. Goldstein, Attorney General of the State of New York; Wendell P. Brown, Solicitor General; John C. Crary, Jr., Assistant Attorney General; Irving I. Waxman, Counsel, State University; Ruth V. Iles, Associate Counsel, of Counsel, Attorney for defendants, The Capitol, Albany, New York.

Before Honorable J. T. Foley—D. J.

Opinion—Decision

The amended complaint herein is filed in behalf of "Earl Webb, as President of Sigma Tau Gamma, a voluntary unincorporated association, and all others similarly situated." This pleading describes the plaintiff as a citizen of the United States and a resident of the State of Missouri and the duly elected and acting President of Sigma Tau Gamma, a social fraternity of male students, having chapters at forty-five colleges and universities throughout the United States. The defendant, State University of New York, is described as a corporation created by and existing under the laws of the State of New York, and empowered by the legislature of the State of New York through its governing board of trustees, the individual defendants named, to generally manage and regulate certain institutions of college level within the State of New York (Article 8 of the Education Law of New York, as added by Chapter 695 of the Laws of New York, 1948, as amended).

It is alleged that by enactment of such pertinent law, the State University of New York, and the trustees, were made responsible for the planning, supervision and management of higher educational facilities, supported in whole or in part by state moneys. Under the original law and

amendments thereto, the defendants were granted the management of some twenty-nine colleges, together with such colleges as might thereafter come under their jurisdiction. The powers delegated to effectuate the legislative purposes were broad and comprehensive. In several of these institutions which by law came within the province and jurisdiction of this State University, the plaintiff had previously, and apparently to the present time, chapters of its national fraternal association.

The main charge of the complaint goes to a resolution of the Board of Trustees, adopted October 8, 1953, allegedly upon the presentation of such resolution by its President, William S. Carlson. The resolution duly adopted states:

> "Resolved that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further
>
> "Resolved that no such social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "Resolved that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

Inasmuch as the plaintiff alleges that it does not discriminate to any extent in the selection of its members, the gravamen of the complaint is directed against the first paragraph of the aforesaid resolution, with slight attack on the last paragraph as granting to the President unreasonable, dictatorial, discriminatory and unjust power.

The complaint is most voluminous, and would not be considered, in my judgment, a model pleading for conciseness. By important amendment, consented to by the defendants, an allegation was added based upon the jurisdictional pro-

visions of Section 1343, Title 28, U. S. C. A., as related to the claimed violations of the civil rights provisions of Section 1983, Title 42, U. S. C. A. Declarative and injunctive relief prayed for in the complaint is based generally upon constitutional grounds in that the provisions of the resolution and their intended purpose and effect are violative of the constitutional rights of the plaintiff as embodied in the First Amendment, particularly in reference to freedom of assembly; the provisions of the Fourteenth Amendment, with particular reference to the due process clause in that there was failure to grant a hearing and the content and method of passage thereof is discriminatory, arbitrary and capricious; the provision of Article I, Section 10, in that existing contract rights are breached. By another important amendment to the original complaint an interlocutory and permanent injunction, after a hearing by a three-judge court is now requested to annul the aforesaid resolution of October 8, 1953.

A motion to dismiss the original complaint had been filed in behalf of the defendants based upon stated grounds to dismiss for lack of jurisdiction in the court, and for failure to assert a claim upon which relief could be granted. The amended complaint is now subject to such motion. Procedural confusion was caused by the uncertainty of the plaintiff as to the need for a three-judge court to decide the merits of the controversy. However, that uncertainty vanished when the mandatory provision of Section 2281, Title 28, U. S. C. A. in relation to injunctive relief against state officers was realized, and the plaintiff thereafter filed a formal application with me for the convening of a three-judge court, the procedure for such call being provided for in Section 2284, Title 28, U. S. C. A. It is now agreed by both sides that the merits, if reached, must be decided by a three-judge statutory court.

As the dust was settling, on the scene came eight (as I count them, the State refers to six in its reply brief) new interveners, and such parties were allowed to intervene and file pleadings with the express consent of the defendants. One, Pi Kappa Sigma is an unincorporated association like the original plaintiff. Four, Phi Sigma Epsilon, Delta

Sigma Epsilon, Alpha Sigma Tau and Theta Sigma Upsilon are foreign corporations. Interveners Alumni Association of Iota of Alpha Kappa Kappa, Inc. and Delta Kappa, Inc. are New York corporations. Roger Mueller is a student at Buffalo Teachers College and a member of Sigma Tau Gamma, previously described. All these intervening plaintiffs, by their pleadings in intervention, attach themselves to the complaint of the original plaintiff with the statement that their rights are almost identical, that each will suffer irreparable injury from the effects of the resolution, and ask for the same relief prayed for in the amended complaint of the original plaintiff. It is evident that the intervention of certain of these parties, particularly the four foreign corporations with their diversity of citizenship and the individual asserting violation of his civil rights raise a conglomeration of jurisdictional problems, perplexing as to whether they may add new hinges in support of jurisdiction (Section 1331, Title 28 U. S. C. A., 1332 (a) (2), 1343 (3)) and may be considered to aggregate the necessary jurisdictional amount.

To each of these intervening pleadings or complaints, the defendants filed separate motions to dismiss similar to the motion filed against the original complaint. The stated grounds for lack of jurisdiction of the subject matter, specifically challenge the presence of substantial questions in relation to deprivation of civil rights, the same presence of substance in relation to matters arising under the constitution, laws and treaties of the United States. It is specifically traversed that the matter in controversy exceeds the value of $3,000.00 exclusive of interest and costs, and the failure of diversity is urged as a ground for dismissal when it applies to the status of the particular party as an unincorporated association, New York corporation or individual citizen of New York. I outline these factors to indicate the variety and complexity of the jurisdictional problems presented.

Despite these intricate questions, the first business at hand for me to decide is the necessity for the convening of a three-judge court, ordinarily necessary because of the injunctive relief prayed for against a state official body (Title 28 U. S. C. A. 2281). In a strong, able and persuasive

brief, the representatives of the State of New York contend that the constitutional claims posed in behalf of all plaintiffs are plainly unsubstantial because of previous holdings in the Supreme Court of the United States on similar matters. From that premise, with the further assumption that the pleadings establish no other ground of federal jurisdiction, it is logically urged that the upholding of such argument would necessarily obviate the convening of a three-judge court.

The principles in regard to the convening of a court of three judges have been clearly stated but are not too simple in application. In California Water Service Co. v. City of Redding, 304 U. S. 252, 254, "It is therefore the duty of a district judge to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable." (Citing Ex Parte Buder, 271 U. S. 461, 467; Ex Parte Poresky, 290 U. S. 30).

Then again in Ex Parte Poresky, supra, "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint * * * The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness' so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the interference that the question sought to be raised can be the subject of controversy." (Citing cases.)

However, in these authorities, imposing the duty of search and scrutiny by the district judge for a substantial federal question in the complaint, it is emphasized that only "*in the absence of diversity*" and when "*no other ground of jurisdiction appears*" does the district judge clearly have the right to dismiss for want of jurisdiction because no substantial question is presented (Emphasis mine) (Ex Parte Poresky, supra; Poresky v. Ryan, 82 F. (2d) 311, cert. den. 298 U. S. 654). A recent decision does establish that diversity of citizenship alone may confer jurisdiction, although it does not follow that such jurisdiction must be exercised

(Alabama v. Southern Ry. Co., 341 U. S. 341, 344-5). Also in Ex Parte Poresky, supra, and in Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 15, it is pointed out that a single judge is not authorized to dismiss the complaint on the merits whatever his opinion might be.

Despite such feeling, the main attack upon substantiality because of previous federal decisions should be discussed. The defendants rely upon the opinions of the Supreme Court in Waugh v. Board of Trustees of the Univ. of Miss., 237 U. S. 589 and Hamilton v. Regents of the Univ. of Calif., 293 U. S. 245. Also, the opinion in Hughes v. Caddo Parish School Board, 57 F. S. 508, affirmed by the Supreme Court 323 U. S. 685 in a memorandum-decision based solely on the authority of Waugh v. Board of Trustees of the Univ. of Miss., supra.

It cannot be seriously questioned that the decisions are close in fact and law to the situation here. As in all legal controversies, arguable and debatable distinctions may be made legally and factually from the situation now presented by the complaint herein. Most significant, however, is the fact that the principle enunciated in the Waugh case and relied upon by the defendants as having such tremendous impact as to foreclose the subject was not cited as authority or precedent in the later Hamilton case. In the Hamilton case, at page 258, the Supreme Court rejected flatly the argument that a substantial federal question was lacking, and stated, "we are unable to say that every question that appellants have brought for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." The significant factor in Hughes v. Caddo, supra, is that the matter was decided by a three-judge court and dismissed for want of jurisdiction, and such procedure was not questioned by the Supreme Court in the affirmance. In a recent case, Pyeatte v. Board of Regents of the Univ. of Oklahoma, 102 F. S. 407, aff'd 342 U. S. 936, a similar challenge in a like situation to a ruling of the Board of Regents was heard by a three-judge court and the matter was considered and denied upon the merits. The court considered and discussed the Hamilton case but did not dismiss peremptorily for want of jurisdiction. Frankly, under this state of the law, I do not find clear uniformity and con-

sistency which to my mind forecloses automatically the position assumed here by the plaintiffs in their pleadings (Rok v. Legg, 27 F. S. 243; Acret v. Harwood, 41 F. S. 492). Because of my own difficulty in research, it would be most hypocritical to state categorically and I am unable to say that the questions are foreclosed and not fairly open to debate, and thus deprive the plaintiffs upon uncertain grounds of the prescribed hearing.

I am fully cognizant of the extreme burden placed upon the federal judiciary by the convening of a three-judge court and realize it should not be lightly extended (Oklahoma Gas & Electric Co. v. Packing Co., 292 U. S. 386, 391). I have also considered the line of authorities which warn against federal interference with state acts, but feel such discretionary decision should be left to the three judges (Railroad Comm. v. Pullman Co., 312 U. S. 496, 500, 501; Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368; Alabama v. Southern Ry. Co., supra; East Coast Lumber Terminal v. Town of Babylon, 174 F (2d) 106).

Finally, if I am in error, it seems that the three judges once convened have the power to correct the situation either directly or indirectly (Osage Tribe of Indians v. Ickes, 45 F. S. 179; Norumbega Co. v. Bennett, 3 F. S. 500, 502, reversed 290 U. S. 598).

Because of the additional jurisdictional claims presented, involving civil rights, diversity, aggregation of interests, and because I am unable to say with certainty there are not constitutional problems presented of substance and importance, which are not arguable because of previous judicial decisions and interpretations, I shall grant the application of the plaintiff for the convening of a three-judge court and shall set the machinery in motion as prescribed in 28 U. S. C. A. 2284. I hold there is sufficient present to warrant such action, and I defer and reserve the motions to dismiss filed by the defendants upon particular grounds stated therein for the consideration and decision of the statutory court, and it is so ordered.

JAMES T. FOLEY,
United States District Judge.

Dated: Albany, New York, April 27, 1954.

Appendix "B"

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors,

Plaintiffs,

against

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President, CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. FREEMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MOORE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, comprising the Trustees of State University of New York,

Defendants

Before: AUGUST N. HAND, Circuit Judge, and STEPHEN W. BRENNAN, and JAMES T. FOLEY, District Judges

Clifford H. Searl, Attorney for Earl Webb and Alumni Association Iota of Alpha Kappa Kappa, Inc.

Hancock, Dorr, Ryan & Shove, Attorneys for Delta Kappa, Inc.

Kernan & Kernan, Attorney for Phi Sigma Epsilon.

Butterfield, Gibbs, Harrington & Bernhardt, Attorneys for Pi Kappa Sigma, Delta Sigma Epsilon Sorority, Alpha Sigma Tau Sorority, Theta Sigma Upsilon Sorority and Roger Mueller; Robert P. Harrington and Julian B. Erway, of counsel.

Nathaniel L. Goldstein, Attorney General of the State of New York, Wendell P. Brown, Solicitor General, John C. Crary, Jr., Assistant Attorney General, Irving I. Wax-

man, counsel, and Ruth V. Illes, associate counsel, for State University.

Albert S. Bard, Counsel for National Inter-Fraternity Conference and the National Panhellenic Conference, Amici Curiae.

AUGUST N. HAND, Circuit Judge:

The plaintiffs and intervenors, as members and affiliates of national fraternities and sororities, seek to void the resolution adopted by the Board of Trustees of the State University of New York on October 8, 1953. The resolution in effect bans social organizations having a direct or indirect affiliation with any national or other organization outside the particular unit of the State University where such social organization is located. The resolution in its entirety is quoted below.* Since the local chapters will have to forego affiliation with the national organization of their fraternity or sorority if they wish to continue functioning at the state units, the plaintiffs claim that the resolution deprives them of their civil rights. Specifically they charge that the resolution was adopted without due process of law, encroaches on their freedom to assembly, denies them equal protection of the law, and adversely affects existing contract rights. Accordingly, a judgment is sought declaring the resolution unconstitutional and enjoining its enforcement. Jurisdiction to pass on this question is founded both under 28 U. S. C. § 1331 and 28 U. S. C. § 1343 (3) as a deprivation of civil rights under 42 U. S. C. § 1983 is alleged.

---

* "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further

"RESOLVED that no such social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further

"RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

Since the validity of the action of a state agency functioning under state statutes is involved, a three judge court was convened pursuant to 28 U. S. C. § 2281. Webb v. State University of New York, Civ. Act. No. 5063 (N. D. N. Y., April 27, 1954).

At the hearing plaintiffs introduced evidence to show the beneficial aspects of national affiliation, the lack of discriminatory clauses in their constitutions, and generally the relationship between the national organization and the local chapters. Testimony was introduced to the effect that no notification of the pending resolution or a chance for a hearing was given. However, we find little merit in the numerous contentions made by the plaintiffs as it is clear that the constitutionality of the action taken here cannot be questioned. A state may adopt such measures, including the outlawing of certain social organizations, as it deems necessary to its duty of supervision and control of its educational institutions. See Waugh v. Mississippi University, 237 U. S. 589; Hughes v. Caddo Parish School Bd., 57 F. Supp. 508, (W. D. La.) affirmed 323 U. S. 685; cf. Hamilton v. Regents, 293 U. S. 245. Moreover, the incidental effect of any action or policy adopted upon individuals or organizations outside the university is not a basis for attack. Pyeatte v. Board of Regents, 102 F. Supp. 407, (W. D. Okla.) affirmed 342 U. S. 936. The plaintiffs have cited no authority contrary to these decisions and since we consider them controlling in the case before us, further discussion becomes unnecessary.

Plaintiffs argue that they were not notified of the pending action, but lack of notice and hearing before adoption of a resolution by an administrative body is not a denial of due process where legislative action of a prospective nature is taken under a valid delegation of powers from the legislature. See Willapoint Oysters v. Ewing, 174 F. 2d 676, 694, (9th Cir.,) cert. den. 338 U. S. 860. Moreover, the Board of Trustees seems clearly within its supervisory powers, see Educational Law, § 355, in making the decision that social organizations, other than strictly local autonomous ones subject without question to local control by the

University, are detrimental to the educational environment at units of the State University.

Accordingly, we find that plaintiffs here have not shown that they have been deprived of any civil rights. Since the Resolution adopted by the Board of Trustees does not encroach on any constitutional rights, the action is dismissed.

Judgment for the defendants.

AUGUST N. HAND,
U. S. C. J.

STEPHEN W. BRENNAN,
U. S. D. J.

JAMES T. FOLEY,
U. S. D. J.

June, 1954.

Original filed June 7, 1954, G. A. Porter, Clerk.

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FILED
SEP 30 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 379.....

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors, *Plaintiffs-Appellants,*

—*vs.*—

STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Garside, et al., comprising the Trustees of State University of New York, *Defendants-Appellees.*

IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM AND BRIEF THEREON

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SUBJECT INDEX.

PAGE

Opposition to Motion to Dismiss or Affirm 1

Statement of the Case 2

Argument 4

Table of Cases Cited

Anti-facist Committee v. McGrath, 341 U. S. 123 .. 7, 8

Avant v. Bowles, 139 F. (2d) 702 8

Bowles v. Willingham, 321 U. S. 503 8

Coe v. Armour Fertilizer Works, 237 U. S. 413, 419 .. 8

Hamilton v. Regents, 293 U. S. 245, 257 12

Morris v. Vandiver et al, 145 Southern Rep. 228 10

Southern Ry. Co. v. Virginia, 290 U. S. 190 8

Schechter Corp. v. United States, 295 U. S. 495 7

Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 318 4

Waugh v. Board of Trustes of University of Mississippi, 237 U. S. 589 ..... 9, 11

Wheeling Steel Works v. Glander, 337 U. S. 562, 574 8

Wright v. Board of Education of St. Louis, 295 Mo. 466; 246 S. W. 43 ..... 9, 10

Statutes Cited

Constitution, State of New York, "Education" XI .. 4

New York Education Law, Section 355 ..... 4, 5

Judicial Code (Title 28 U. S. C.)

Section 1253 2

Section 2281 2

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALMUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors,

Plaintiffs-Appellants.

—*vs.*—

STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Garside, et al., comprising the Trustees of State University of New York,

Defendants-Appellees.

IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM, AND BRIEF THEREON

MAY IT PLEASE THE COURT:

Now come the appellants in the above entitled cause, by their counsel, and move that appellees' motion to dismiss or affirm be dismissed and denied, that this cause be set down for argument, that the judgment herein be reversed,

and such relief be accorded as to the Court seems just and proper.

Statement of the Case

This action was commenced on November 25, 1953, in the District Court for the Northern District of New York, seeking a declaratory judgment and an injunction. A motion to dismiss was brought on the 4th day of January, 1954. Thereafter certain amendments to the complaint were allowed, orders were granted, permitting seven other associations or corporations and an individual to intervene. On April 27, 1954, Hon. James T. Foley, a District Judge for the Northern District of New York, granted the application of plaintiffs'-appellants herein for the convening of a three-judge court (28 U. S. C. § 2281), reserving the motions to dismiss filed by defendants for the consideration and decision of the Statutory Court.

Circuit Judge Augustus N. Hand, together with District Judge Stephen W. Brennan and District Judge James T. Foley heard the evidence at the Federal Building, in the City of New York, on the 25th day of May, 1954. A written decision and judgment was handed down on June 7, 1954. This decision and judgment did not question the jurisdiction of the Court. From that judgment an appeal was perfected and allowed by Judge Stephen W. Brennan to this Court on the 25th day of June, 1954 (28 U. S. C., § 1253). Appellees served a motion to dismiss or affirm on the 22nd day of July, 1954.

The plaintiffs challenged the first and third paragraphs of the resolution quoted below, passed by the Trustees of State University of New York on the 8th day of October, 1953, at the request of defendant William S. Carlson.

President of State University. The resolution is as follows:

> "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit, and be it further
>
> "RESOLVED that no social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

It is admitted that plaintiffs were granted no notice, nor hearing, or right to be heard.

ARGUMENT

I

Appellants fully appreciate that this judgment cannot be reversed unless they show that the Circuit Court abused its discretion in granting the judgment herein. (Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 318).

The Constitution of the State of New York, under heading "Education", Article XI, provides:

"(Regents of the University) § 2

"The corporation created in the year One Thousand Seven Hundred Eighty-four under the name of the Regents of the University of the State of New York, is hereby continued under the name of the University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents. (Formerly § 2 of Art. 9. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)"

Under "Article V, § 4——. The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department."

("The University of the State of New York", mentioned above, is not to be confused with "State University of New York", the action of the trustees of which is herein assailed.)

Section 355 of the Education Law of the State of New

York was added by chapter 695 of the Laws of 1948, as amended, to take effect September 1, 1953. Both the original act and amendments provide as follows:

"§ 355. Powers and Duties of Trustees—Administrative Functions.

"2. *The State University Trustees are further authorized and empowered, subject to the general supervision and approval of the Board of Regents:*

"b. To make and establish and from time to time alter and amend such rules and regulations, not inconsistent with law, for the government of the State University and the institutions therein."

Upon the trial of this action, plaintiffs' counsel offered in evidence, and the court received, a copy of an affidavit setting forth the resolution verbatim and asking Frederick A. Morse, Secretary to Board of Regents, whether the Board of Regents had ever approved of this action of the Trustees of State University. (Record page). A copy of the letter from Mr. Morse, Secretary to the Board of Regents, dated April 20, 1954, was read into the record as follows:

"Clifford H. Searl, Esq.
Hotel Syracuse
Syracuse, New York

"Dear Mr. Searl:

"This will acknowledge your letter of 19 April respecting action taken by the Trustees of the State University of New York. I am passing your letter on to Doctor Charles A. Brind, Jr., counsel to this department for his reply.

Very sincerely,

F. A. MORSE"

(Record Page).

Under date of April 26, 1954, Mr. Brind wrote Clifford H. Searl as follows:

"Dear Mr. Searl:

"This acknowledges the receipt of your letter of April 19, addressed to Mr. Morse, which has been referred to me for reply.

"You are advised that the Regents have not taken any action in respect to the resolution to which you refer, the same having never been referred to the Regents for their consideration.

Very truly yours,
CHARLES A. BRIND, JR."

Plaintiff's counsel then asked the Court that this affidavit be received as part of the record in the case. The Presiding Judge then asked defense counsel if there was any objection. To this inquiry defense counsel replied:

"No, there is no objection, Your Honor, provided we can submit certified copies of letters which indicate they had given a prior general approval to matters of this kind." (Page Record).

No such letters were offered by defendants. One of two exhibits offered by defendants, a circular (Defendants' exhibit "A") contains the certificate of incorporation of State University and the data leading up to its adoption. This exhibit demonstrates the fact that the Regents is the main governing body of the State Educational Department, to which all action of the Trustees of the State University is subject. The other exhibit, Exhibit "B", consisted of a statement issued by defendant Carlson.

As this resolution *has never been approved by the Regents*, there is no basis for a finding that it is legal, and a

judgment based on its legality cannot stand, we respectfully urge.

Such power as defendants claim the President and Board of Trustees of State University of New York were granted in the instant case, without the approval of the Board of Regents, would clearly be an unconstitutional delegation of legislative power. (Schechter Corp. v. United States, 295 U. S. 495).

II

Notice and opportunity to be heard are indispensable to a fair trial, whether the case be criminal or civil. (Anti-facist Committee v. McGrath, 341 U. S. 123.)

Does the resolution here adopted deprive the appellants of any property right without due process of law, contrary to the requirements of the Fourteenth Amendment?

Disregarding for the moment the loss suffered by other plaintiffs through failure to receive dues and initiation fees, we will only consider the inevitable loss to the Alumni Association of Iota of Alpha Kappa Kappa. The record shows this society was incorporated by physicians in Syracuse in 1912 and that their chapter house has been leased to the active chapter for over forty years. The membership is confined exclusively to medical students. The house is furnished throughout. Donald F. Mullin, a qualified real estate expert, testified that the sound value of the structure as a fraternity house was $18,000; that because of its use it would depreciate in value because of this edict to the amount of $12,000. It could not well be converted to use as a rooming house, or any other purpose. To convert to a rooming house would cost $11,800.

The active chapter pays to this Alumni Association as rent $1,500 a year. In 1953 the Alumni Association paid $2,840.00 for permanent improvements and the house is insured for $30,000. The fraternity became a part of Syracuse University years ago and has remained as such until the State University recently took over. Now both the alumni and active chapter are out.

Reference is hereby made to the following authorities dealing with the question of notice and hearing:

> *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 419.
>
> *Anti-facist Committee* v. *McGrath*, 341 U. S. 123.

A corporation may raise the issue of due process, (*Wheeling Steel Works* v. *Glander*, 337 U. S. 562, 574).

As said in *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190:

> "Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed."

Counsel for defendants cites *Bowles* v. *Willingham*, 321 U. S. 503 as authority for the statement that the promulgation of a legislative regulation does not require notice and hearing. A reading of the opinion in the case of *Bowles* v. *Willingham* will show that *Avant* v. *Bowles* (139 F. (2d) 702) is cited. A portion of the opinion in the latter case, at page 707, reads:

> "It may well be that the due process clause requires notice and hearing to the individual to be affected before the exercise of such a power."

III

Appellants have demonstrated that neither in their constitutions nor in practice do they in any way discriminate because of race, color, religion, creed, national origin, or other artificial criteria. Therefore, the only logical conclusion that can be arrived at is that the action of the trustees is unreasonable and arbitrary.

In fact, the evidence discloses that one chapter at Oswego, New York, has elected a colored man as president. A fraternity picture, plaintiff's exhibit 21, shows two colored boys, while others testified they have initiated Chinese, Japanese and Indians. All chapters have members of the Catholic, Protestant and Jewish faiths.

IV

A Board possesses such powers, and such only as have been expressly conferred by statute, or are necessarily implied from those so conferred. (Wright v. Board of Education of St. Louis, 295 Mo. 466; 246 S. W. 43).

This statement brings up immediately a discussion of the facts in *Waugh* v. *Board of Trustees of University of Mississippi* (237 U. S. 589). In the *Waugh* case the legislature had passed an act expressly abolishing all Greek letter fraternities and prohibiting them from existing in the institution.

Counsel for defendants has recited in his brief some of the facts in that case. The Court there stated:

> "It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to *the limitations of the law.*"

BOOR COPY

In the instant case it can properly be urged that as the legislature inserted in the powers granted to the Board of Trustees of State University to make rules, it, by the same act, specifically provided that they might adopt only such rules as met the approval of the Board of Regents. Without such approval, no such rule could exist.

To this effect the court in *Wright* v. *Board of Education of St. Louis, supra*, has held that a rule similarly passed was void.

The headnote of the case recites:

> "*Express Prohibition: Distinction.* In determining the power of a public school board, under a general statute authorizing it to make rules for the government of the school, to prohibit high school pupils from becoming members of Greek-letter fraternities, decision *based on an express statute forbidding the organization of such societies* or membership therein *furnish no guide.* Nor do decisions based on statutes which give to school boards general charter powers not reviewable by the courts."

To the same effect see *Morris et al* v. *Vandiver et al.* (145 Southern Rep. 228). There Section 6676 of the State Code provided that:

> "The Trustees shall have control of the property, elect and fix salaries of all teachers of the school, and shall have full power to do all things necessary to the successful operation of said school." (p. 231).

Held, that such board of trustees was without power to enforce payment of athletic, literary and library fees as a condition precedent to the rights of a student to enter school. (This case cites the *Wright* case. It also cites

many authorities throughout this country to the same effect).

One other distinction in the *Waugh* case is worthy of mention. The opinion in the case contained this statement:

> "But counsel overlook that it is an obvious principle of construction, and sometimes of justice, that laws are not to be construed retrospectively. The trustees regarded and followed the principle and left undisturbed the students already in the university—it was based on an obvious and rational distinction, and the Supreme Court sustained its competence."

Then follows:

> "—the board of trustees of the University adopted an order which recited that the board desired it to be understood that the statute was 'not to be construed to apply to students already entered and who conducted themselves with that decorum always expected of Southern gentlemen.'"

In the instant case the resolution of the Trustees has not respected this proviso that the resolution should not be construed *retrospectively*, for not only the letter of Dr. Rice, president of Buffalo Teachers' College (see stipulation), but the record indicates that the students already in college should disassociate from the national by June, 1954.

Judge Foley, District Judge, rendered his opinion in the lower court on April 27, 1954. Therein he dealt with defendants' motion for dismissal, based on the argument that the questions sought to be raised were so manifestly unsubstantial in the light of controlling decisions as to warrant no further argument. After discussing for some

length the *Waugh*, *Hughes*, *Hamilton* and *Pyeatte* cases, he stated:

> "Frankly, under this state of the law, I do not find clear uniformity and consistency which to my mind forecloses automatically the position assumed by the plaintiffs in their pleadings."

The Court was justified in this statement. In *Hamilton* v. *Regents*, 293 U. S. 245, at page 257 the Court states:

> "But by the California *constitution* the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university, which, as it has been held, is a constitutional department or function of the state government.
>
> "And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention cannot be sustained; for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for lack of substance."

In each one of the cases cited by defendants the action was either taken as provided in the State Constitution or in pursuance to an express State Statute authorizing such act.

Appellants seriously urge that the national fraternity system, which has existed in American colleges for over one hundred and twenty-five years, and has included in its membership many of the finest minds in the country among whom are several presidents of the United States, should not be arbitrarily thrown out without an opportunity to be heard by the highest Court in our land.

BLEED THR

Therefore, as the Trustees of State University have not complied with the provisions of the statute, requiring approval by the Board of Regents, the supreme educational body of the state, we respectfully maintain that the action taken by the defendants-appellees must fail.

Dated: July 31, 1954.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 379

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Plaintiffs-Appellants,

vs.

STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Carside, *et al.*, comprising the Trustees of State University of New York,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX.

PAGE

Motion to Dismiss or Affirm 1

Statement of the Case 1

Argument 5

The questions sought to be raised are so manifestly unsubstantial in the light of controlling decisions as to warrant no further argument 5

TABLE OF CASES CITED.

Bi-Metallic Invest. Co. v. *State Board of Equal.*, 239 U. S. 441, 445 3

Bowles v. *Willingham*, 321 U. S. 503 3

Hamilton v. *Regents*, 293 U. S. 245 ..... 8, 9

Hughes v. *Caddo Parish School Board*, 57 F. Supp. 508, aff'd, 323 U. S. 685 7

Pyeatte v. *Board of Trustees of University of Oklahoma*, 102 F. Supp. 407, aff'd 342 U. S. 936 9

Waugh v. *Board of Trustees of University of Mississippi*, 237 U. S. 589 ..... 6, 8

Willapoint Oyster Co. v. *Ewing*, 174 F. (2d) 676, 694, cert. den. 338 U. S. 860 3

STATUTES CITED.

New York Education Law

Section 313 2

Section 351 2

Section 352 2

Section 355 3

Judicial Code (Title 28 U. S. C.)

Section 1253 4

Section 2281 1

Supreme Court of the United States

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Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the order and judgment appealed from be affirmed.

Statement of the Case

This appeal is from a judgment entered upon the decision of a three judge court, convened pursuant to Section 2281 of the Judicial Code for the Northern District of New York, which judgment, after trial, dismissed the action.

The action was originally brought by an unincorporated association which avers that it is a "social fraternity" having chapters at colleges throughout the United States including several colleges of the defendant State University of New York. The latter is a corporate instrumentality of the State charged with responsibility for the "planning, supervision and administration of facilities, and provisions for higher education supported in whole or in part with state moneys". Its basic purpose is to provide for "a comprehensive and adequate program of higher education" (Education Law §§ 351, 352).

The plaintiffs sought an injunction on grounds of alleged unconstitutionality against enforcement of a regulation of the State University adopted by its governing Board of Trustees as follows:

> "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further
>
> "RESOLVED that no social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

The complaint attacks neither the validity of nor the authorization for the second paragraph of the resolution. It is not suggested that there is any constitutional compulsion on a State University to approve and accept such organizations at its colleges (Cf. Education Law § 313). Nor is

any real controversy presented by contentions aimed at the third paragraph. The appellant organizations allege that they are "social" and no claimed right to be otherwise classified is in any way involved.

The attack centers on the related first paragraph of the resolution by which the Trustees, in whom is vested full power to regulate all matters pertaining to the operation and administration of state-operated institutions in the State University (Education Law § 355), have barred social organizations of students having affiliations outside the institution and thus subject to direction and control beyond the supervision of the educational authorities responsible for an adequate program of higher education furnished by the State. The claims of unconstitutionality are broadly formulated as denial of civil rights, of free speech, assembly and religion, under the First Amendment of the United States Constitution (presumably as made applicable to the State by the Fourteenth) and deprivation of due process and equal protection under the Fourteenth Amendment itself. Part of the due process objection is based on lack of notice and hearing before promulgation of this clearly legislative regulation, even though it was expressly conceded on argument and in the briefs before Judge Foley as a single District Judge on the original motions to dismiss, that no objection whatever could have been made "had the legislature passed a similar act." (See *Bowles* v. *Willingham*, 321 U. S. 503; *Bi-Metallic Invest. Co.* v. *State Board of Equal.*, 239 U. S. 441, 445; *Willapoint Oyster Co.* v. *Ewing*, 174 F. (2d) 676, 694, cert. den. 338 U. S. 860). Incidental claims of interference with vaguely specified relations between the fraternity and its members, and others, are also made.

The complaint was amended several times and eight intervenors were permitted to come in. Seven were other

national fraternities and sororities, both corporate and unincorporated. Only one is an individual student at a State University institution, apparently brought in in an effort to have a plaintiff with standing to raise civil rights questions.

The defendants urged that only a three judge court could grant the relief sought on the grounds claimed but addressed motions to dismiss to the single District Judge on the ground that the constitutional questions were so wholly unsubstantial that he had power to dismiss the complaint. Judge Foley convened a court of three judges and reserved decision on the motions until the trial before it. His opinion, annexed to the appellants' jurisdictional statement, indicates that he was impelled to do so largely because in some of the cases urged as controlling by the defendants, and held to be so by the three judge court, this Court had affirmed on motion judgments of dismissal rendered by courts of three judges without question of jurisdiction.

The three judge court heard the proof of the parties and at the close of the trial dismissed the action on the ground that prior decisions were clearly controlling on the facts and the issues raised. That court's opinion is likewise annexed to the jurisdictional statement.

Review of the judgment of a three judge court denying an injunction may be had on direct appeal to this Court in any case required to be heard and determined by such a court (28 U. S. C. §1253). The court below held that the merits of the constitutional questions sought to be raised by appellants were decisively settled by prior decisions of this Court. We submit that the decision was so clearly right as to leave no further substantial questions.

ARGUMENT

The questions sought to be raised are so manifestly unsubstantial in the light of controlling decisions as to warrant no further argument.

The testimony at the trial of the defendant Carlson, President of the State University of New York, shows that social organizations among students at institutions of higher learning have long been an educational problem of concern to those responsible for the proper functioning of such institutions. It shows also that restrictions upon or prohibitions against national fraternities and sororities are an established policy at many universities. The immediate cause of concern to the State University was specific instances of racial and religious discrimination by such organizations, concededly inadmissible at State operated and supported institutions. This brought the whole problem to the fore and it was carefully investigated and considered before adoption of the measure involved.

The testimony offered by defendants was generally directed at showing that their own organizations professed high standards and had no discriminatory requirements. It also bore on the relationship between the national organizations and their local chapters and members. These things were referred to by the Court in its opinion. Nothing was found to deprive the defendants, in the exercise of their clearly granted powers, of authority to decide that "social organizations, other than strictly autonomous ones subject without question to local control by the University, are detrimental to the educational environment at units of the State University." No rights were found violated by a regulation based on such a decision so as to result in any

constitutional compulsion on the defendant University to permit such organizations at its colleges.

The regulation does not constitute a general police prohibition against social organizations. It affects no one except in his capacity as a student at a State University unit and concerns itself with organizations which have their existence only in connection with those attending upon such colleges. Long ago the basic authority to adopt such measures was settled in *Waugh* v. *Board of Trustees of University of Mississippi*, 237 U. S. 589. There, the complainant sought to enjoin enforcement of a Mississippi statute, which expressly abolished certain named Greek letter fraternities and all other secret societies and prohibited them from existing in the University of Mississippi, a State educational institution. It was provided that any student who is a member of any of the prohibited societies could not compete for or receive class honors or diplomas or compete for any prize or medal, but it was further provided that such restrictions would not apply to any member of the prohibited societies if he filed an agreement upon entering any of the schools that he would not, during his attendance, "affiliate with same, nor attend their meetings, nor in any wise contribute any dues or donations to them". The complainant had been a member of one of the societies at another college and, upon applying for admission to the University of Mississippi, refused to sign pledges designed to carry the statutory restrictions into effect. Upon being refused admission, he brought action in the State courts, specifically alleging that he was deprived of his property and property rights and of his liberty, in violation of the Fourteenth Amendment. In its decision upon the appeal thereto, this Court commented that counsel had built

"elaborate and somewhat fervid arguments" upon the several elements of their claims of invalidity. It disposed of them clearly and completely as follows:

> "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying perhaps with each one and dependent alone upon his promise.
>
> "This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the State considers inimical to discipline, finds no prohibition in the Fourteenth Amendment." (pp. 596, 597).

In *Hughes* v. *Caddo Parish School Board*, 57 F. Supp. 508, aff'd, 323 U. S. 685, complaint was made of a Louisiana act authorizing school boards to abolish high school fraternities and sororities, and of the act of the defendant Board in so abolishing such organizations and making it the duty

of superintendents to suspend or expel students "who might be or remain" members thereof. A motion to dismiss the action for want of a substantial Federal question was made, although invasion of personal liberties under the Fourteenth Amendment was alleged in terms. The motion was heard by a three-judge court in the first instance and granted on the authority of the *Waugh* case. On the same authority, this Court affirmed the judgment of dismissal on motion.

These cases settle beyond possibility of now raising any substantial controversy that it is within the power of educational authorities to adopt such disciplinary measures for governing the institutions under their control without invading constitutional rights of students. There is clearly no greater right in the organizations themselves to compel their recognition by educational authorities and to insist that they be permitted to operate at their institutions.

Hamilton v. *Regents*, 293 U. S. 245 must also be considered. In that case, students at the University of California asked to be exempted from the requirement of the Regents, in accordance with the organic law governing the University, that students take prescribed courses in military science and tactics in the Reserve Officers Training Corps. The ground upon which exemption was claimed was their religious and conscientious objection to war and military training. The Regents, who, like defendants, constituted a corporation for administration of the State University, refused to exempt them or make such training optional.

Upon refusal of the State courts to compel the Regents to accept them as students without taking the prescribed courses, an appeal was taken to this Court with respect to

their claim that the action of the State under its statutes and regulations deprived them of their liberty, guaranteed by the Fourteenth Amendment. It was held that their assertion of a right under the Fourteenth Amendment to be students at the State University, free from obligation to take one of the courses prescribed as a condition of attendance, was completely untenable.

The Court significantly noted that the students were not compelled by the State to attend the University. They were seeking education offered by the State and, at the same time, seeking to compel the State to relieve them of prescribed conditions of attendance. The State granted the privilege of college education at its own institutions and the liberty of conscience, safeguarded by the due process clause of the Fourteenth Amendment, conferred no right to such an education freed from its obligations. The appellants were free to think and believe as they pleased, but their beliefs did not empower them to dispense with prescribed requirements of the University if they chose to attend it.

The *Hamilton* case illustrates that even such personal liberties, safeguarded by the Fourteenth Amendment, as freedom of conscience cannot be turned into a compulsion upon state-operated institutions of higher learning to abdicate their functions of governing their curricula and the discipline and conduct of those who elect to attend them.

Finally, *Pyeatte* v. *Board of Trustees of University of Oklahoma*, 102 F. Supp. 407, aff'd, 342 U. S. 936, completely settles that a State University is not deprived of its power to manage its own institutions by the incidental effect of its regulations upon relationships theretofore existing between students and others. There it was held that the pro-

prietor of private rooming quarters, theretofore used by students, had no constitutional complaint because of a University requirement that all students sleep in college dormitories. The State University is clearly not compelled to maintain conditions under which private social organizations can continue to exist thereat.

The heavy weight of these authorities in their direct application to the facts and contentions here present seem to us to deprive the issues tendered by the appeal of any substance warranting further review. We respectfully submit that the judgment below should be affirmed.

Dated: July 16, 1954.

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No. 379. WEBB ET AL. *v.* STATE UNIVERSITY OF NEW YORK ET AL. Appeal from the United States District Court for the Northern District of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Clifford H. Searl* and *Daniel F. Mathews* for appellants. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, *John C. Crary, Jr.*, Assistant Attorney General, and *Irving I. Waxman* for appellees. Reported below: 125 F. Supp. 910.